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*poster by Fred Moore for the  
National Resistance Committee*

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29 January 2021

FOIA Appeals  
Deputy Archivist of the United States (ND)  
National Archives and Records Administration (NARA)  
8601 Adelphi Road, Room 4200  
College Park, MD 20740-6001

(by e-mail to <foia@nara.gov>)

**FOIA Appeal of Verbal Denial and  
Request for Reconsideration of Denial of Appeal of Expedited Processing**

Dear Deputy Archivist:

This is an appeal of the partial denial of a FOIA request to NARA for records, physical possession and/or control of which was transferred to NARA at the expiration of the statutory mandate for the National Commission on Military, National, and Public Service (NCMNPS), and a request for reconsideration – in light of the exclusion of the improperly withheld records, which include many of those which most clearly justify expedited processing, from the consideration of my request for expedited processing and your consideration of my appeal of the denial of expedited processing – of the denial of expedited processing of this request

I submitted this request to NARA by e-mail on 21 September 2020, and included a request for expedited processing. I have been told that portions of this request have been assigned tracking numbers **NGC20-638**, **NARA-NGC-2020-001111**, **20-54033**, **RF-312**, and **ER0566**. Other portions of this request – including the portion which has, I have just learned yesterday, been denied – have not yet, so far as I know, been assigned any tracking number(s).

Edward Hasbrouck, <<https://resisters.info>>  
FOIA Appeal and Request for Reconsideration of Denial of Expedited Processing  
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This request has been denied in part, and some responsive records have been withheld. This decision was communicated to me verbally and informally during a phone call yesterday, 28 January 2021, with Mr. Gary M. Stern, NARA's General Counsel, Chief FOIA Officer, and FOIA Public Liaison. Because I was provided with neither timely notice nor any written notice of the partial denial, I do not know with certainty when the decision to deny part of my request was made (although Mr. Stern said that it had been made many months ago), what decision-maker was responsible for the decision, or the purported basis for the denial.

However, both in an abundance of caution and lest responsive records be destroyed before the decision to withhold them can be appealed, I hereby appeal this partial denial.

Because I have received no written notice of the denial, I am obliged to try to restate what I was told about the denial yesterday by Mr. Stern, which I can best do in the context of my prior exchanges of e-mail with Mr. Stern and other (many of them unsigned) NARA officers or staff regarding this request, which I have attached to this appeal.

As a prefatory matter, I note that my rights including my ability to effectively argue this appeal have been gravely prejudiced by NARA's clearly unlawful and apparently bad-faith failure to provide me with prompt or proper notice of the partial denial, the reasons for it, or my right to appeal it, or to make available either the assistance of the FOIA Public Liaison or the mediation services of the Office of Government Information Services (OGIS) in response to my repeated requests for their assistance in clarifying the status of this request. And my rights have been both gravely and irrevocably prejudiced by the months of delay in notice of the denial, despite all possible diligence on my part in (unsuccessfully) attempting to ascertain whether any part of my request had been denied, and if so when, by whom, and on what basis.

Were I to seek legal advice concerning this matter, any attorney would first want to review the notice of the denial before advising me what rights I might have, how to pursue them, the legal validity of NARA's arguments, the arguments that might be raised in response, or the likely outcomes. To be clear, I have no present intention or ability to afford to litigate, and my legal rights (including the right to make FOIA requests, the right to have them processed in accordance with applicable law and regulations, the right to receive responsive non-exempt records, and the right to administrative due process including notice and the opportunity to appeal adverse decisions) are not limited to the right to sue. I do not believe, and I hope NARA does not believe, that those who don't sue have, or should have, no rights. But my ability to "shop this matter around" to potential *pro bono* counsel (who might assist me with administrative appeals as well as with any possible litigation) is effectively sabotaged and delayed by NARA's failure to provide me with prompt, proper written notice of its decisions.

I have attached only those portions of my e-mail correspondence with NARA that are most relevant to clarifying my exercise of due diligence, NARA's bad faith, and what I was told – or, more precisely, not told – with respect to whether this request had been denied in part. I

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presume that the complete record of my e-mail correspondence with NARA in relation to this request is available to the FOIA Appeals Officer from NARA's records. If it is not, and if you believe that it might be relevant to this appeal, I will provide it on request. My first and only telephone conversation with anyone at NARA about this request, despite leaving repeated voicemail messages since September 2020 for Mr. Stern, other NARA FOIA Public Liaisons, and OGIS, seeking to confer with them about this request, was yesterday with Mr. Stern.

Following my submission of this request on 21 September 2020, I received an unsigned acknowledgment by e-mail on 24 September 2020 from "The FOIA Team, Office of General Counsel, National Archives and Records Administration", <[foia@nara.gov](mailto:foia@nara.gov)> (Attachment A to this appeal and request for reconsideration).

This message indicated that my request had been divided into two portions: that portion "seeking access to permanent records of the [NCMNPS] that have been accessioned into the National Archives" and that portion "seeking temporary NCMNPS records". (It was not indicated whether this division between "permanent" and "temporary" records, for purposes of this request, would be based on categorization of records by the NCMNPS before its dissolution, or on *de novo* review and classification of records by NARA.)

With respect to "temporary" records, NARA's message of 24 September 2020 stated:

"Please note that any search for NCMNPS temporary records will be limited to those temporary records that were subject to a retention period beyond the termination of the Commission [the NCMNPS] pursuant to the General Records Schedule (GRS) for which NARA took legal custody. This is not deemed to be a request for records contained within the NCMNPS temporary records that were appropriately scheduled for disposal upon the termination of the Commission on September 18, 2020 and that NARA is holding for a short interim period. As you were previously informed prior to the termination of the Commission, NARA will not accept FOIA requests for those records."

This was framed as a "note", not as a notice of denial or final determination. No basis was stated for declining to "accept" FOIA requests for certain records, and I don't know what this would mean, since "acceptance" is not an act described in the FOIA statute.

To avoid any possibility of misunderstanding and to ensure that I would have the opportunity to appeal any adverse determination as soon as it was made, so as to avoid delay in receiving responsive records, I wrote back the next day, 25 September 2020, seeking clarification. My inquiry (Attachment B) could not have been more explicit:

"It is unclear to me whether this message is intended constitute (1) a request that I agree to narrow this FOIA request, (2) a description of the intended methodology

and scope of your search for responsive records, (3) a notice of denial of a portion of my request, (4) a notice of a determination that some responsive records are exempt from disclosure, or (5) a notice of unilateral modification by you of my request.

“Each of these raises different concerns. Please clarify the intent of the portion of your message quoted above, so that I can respond appropriately.”

NARA responded with another unsigned e-mail message (Attachment C) on 1 October 2020:

“The language you referenced from our acknowledgment of your FOIA request was included to provide you with advanced notice of, as you called it, the ‘description of the intended methodology and scope’ of our search for records responsive to your request. Again, our search for temporary records responsive to your request will be limited to the temporary records that were subject to a retention period beyond the termination of the Commission pursuant to the General Records Schedule (GRS) for which NARA took legal custody. We hope this answers your inquiry.”

This message was at best highly misleading, and at worst deliberately deceptive.

Notably, although NARA had already (as I learned only yesterday, four months later) (1) determined that some of the records I requested were exempt from disclosure (because they were not, in NARA’s determination, NARA records), and (2) decided to deny my request in part, NARA did *not* disclose or mention either of those decisions, *even when I specifically asked* whether NARA had “deni[ed] a portion of my request” or “determin[ed] that some responsive records are exempt from disclosure.” Instead, NARA sent me a message describing this solely as an “advanced notice of... the intended methodology and scope of our search.”

While such a notice of *intended* search methodology and scope might be appealable, it is more likely that any attempt to appeal it would be rejected as premature, since the search was not yet complete and there was no notice of any final determination.

The issue not yet being ripe for appeal, but in an attempt to persuade NARA to conduct an adequate search – and relying on the implication of NARA’s message of 25 September that this was solely a scope-of-search issue – I wrote back to NARA immediately on 1 October 2020 (Attachment D), reiterating and explaining the scope of my request and what would need to be included in the scope of a search reasonably calculated to retrieve all responsive records.

I have to date received no response whatsoever to my message of 1 October 2020. So far as I knew until Mr. Stern’s phone call yesterday, this remained an issue pending for eventual final determination by NARA, of which determination I would receive notice.

Again notably, and again misleadingly, NARA did *not* respond to my message of 1 October 2020 to inform me that it had already made a final decision to deny any part of my request, or that some of the requested records were exempt from disclosure.

“Acceptance” of a FOIA request is not mentioned in the FOIA statute, much less defined as a prerequisite to the right to receive responsive records or as a discretionary agency action. So far as I know, NARA’s obligation to respond to a request – either by a proper denial or by production of responsive records – is triggered by *receipt* of a request at one of the addresses designated for that purpose in FOIA regulations, which NARA had acknowledged. Whether NARA had “accepted” this request was and is, so far as I know, irrelevant to NARA’s continuing obligation to respond, and NARA had provided no reason why it might think otherwise.

Accordingly, I continued to await a response and continued (unsuccessfully) to seek the assistance of the FOIA Public Liaison and OGIS mediation services with respect to the status and estimated date of completion of action with respect to my request, in its entirety.

On 14 December 2020, still having heard nothing from NARA’s FOIA Public Liaisons or OGIS, I received a surprising e-mail message from Mr. Stern (Attachment E), stating that:

“[A]s has already been explained to you, the ‘temporary records received by NARA from the NCMNPS that were \*not\* 'subject to a retention period beyond the termination of the Commission pursuant to the General Records Schedule (GRS)’ are not in NARA’s legal custody, and NARA will not respond to any FOIA requests for those records. Rather, as noted in Mr. Heck’s letter denying your administrative appeal, ‘Out of an abundance of caution, NARA intends to retain these temporary records until December 7, 2020—90 days from the date of your appeal of our denial of your FOIA request—for the purpose of allowing you to address any further legal rights related to this specific FOIA request.’...”

“NARA agreed to keep the records for an additional 90 days, ‘out of an abundance of caution,’ in case you wanted to file... a lawsuit. While that time has now lapsed, NARA will hold this set of the Commission’s records for an additional 60 days, or until February 15, 2021, to afford you that opportunity. We do not intend to respond to any further queries about this matter.”

I responded to Mr. Stern that same day, 14 December 2020 (Attachment F), noting my surprise and puzzlement:

“You are mistaken. It has never been ‘explained’ to me that these records ‘are not in NARA’s legal custody’ Rather, I have been told that these records have been ‘transferred to’ and are being ‘held by’ or ‘retained by’ NARA. All this implies, so far

as I know, NARA's legal custody of them, particularly in the absence of any identification to me of any another custodian of these records.

“Moreover, I was specifically and explicitly informed by you in your e-mail message on 14 September 2020 that, ‘NARA is currently in the process of taking interim custody’ of these records.

“If you have since formed the opinion that, although they have been ‘transferred to’ and are being ‘held by’ NARA, and that NARA was ‘taking... custody of these records, they are no longer ‘in the legal custody of NARA, I request your assistance as FOIA Public Liaison – which assistance is required by the FOIA statute to be made available to requesters – to identify the agency other than NARA which you now believe to be the legal custodian of these records, so that I can request these records from that agency pursuant to [FOIA].

“I also request that, in accordance with the FOIA statute, you refer any portion of my pending request to NARA, with respect to which which you believe that potentially responsive records may be held by another agency, to that agency, if you have not done so already....

“My ‘legal rights with respect to’ these records include my right, now that they have been transferred to and are being held by NARA, to request them from NARA pursuant to FOIA, as I have now done through the FOIA request to NARA with respect to which I am seeking your (statutorily mandated) assistance as FOIA Public Liaison (A) in properly direct[ing] my request and/or having it properly referred to the current lawful custodian of these records, and (B) in conferring with you regarding possible narrowing of this request if that might expedite a response....

“I reiterate my request for the assistance of the FOIA Public Liaison, as discussed above, (A) to determine the proper agency (if not NARA) to which to direct a request or have this request referred, and (B) to confer regarding possible narrowing of this request to expedite a response.

“I request the mediation service of OGIS to assist me in (C) obtaining the assistance of the FOIA Public Liaison with respect to this request and (D) identifying what agency – if not NARA itself – NARA now believes to be the legal custodian of these records transferred to and held by NARA.”

I have to date received no response to this message. Again notably, NARA did not respond to inform me that NARA had determined (as it had I learned yesterday that NARA had actually determined months ago) that no agency had legal custody of certain of the responsive records, that my request would not (and could not be) referred to any other agency, and that no agency was responsible for responding to my request or producing the responsive records.

FOIA case law, as discussed further below, is clearly established: An agency subject to FOIA (which NARA indisputably is) in actual possession and/or control of records (as NARA is with respect to these records, and has repeatedly stated to me) created by an agency subject to FOIA (as the NCMNPS indisputably was) must respond to FOIA requests for those records, *unless* it promptly and transparently refers the request to another agency for response, without that referral impairing the requester's ability to obtain the records or significantly increasing the amount of time she must wait to obtain them.

The only plausible inference I could draw from Mr. Stern's message of 14 December 2020 (Attachment E) that could possibly be consistent with the law would be if NARA had formed the opinion that some other agency would be better able to respond to some part of my request, and had in fact promptly referred that portion of the request to that agency.

So my focus, in reasonable reliance on what I had been told by NARA, was on determining which other agency or agencies NARA had determined held "legal custody" of records responsive to my request and/or would be responsible for responding, and on ensuring that my request had been, or was, referred to that agency or agencies without further delay.

Until 27 January 2021, when Mr. Stern finally returned one of my voicemail messages, I received no further communication from NARA's FOIA Public Liaison's or OGIS, despite repeated e-mail and voicemail messages reiterating my request for their assistance, which they are mandated by statute to make available to the public. I assume that I received no response because Mr. Stern had (unlawfully) directed the other NARA FOIA Public Liaisons and OGIS not to respond, consistent with the (also unlawful) statement in his message to me of 14 December 2020, "We do not intend to respond to any further queries about this matter."

Until yesterday, I had received *no hint whatsoever* from anyone at NARA – despite my diligent attempts to clarify the situation, including explicit questions to the FOIA Officers and requests for the assistance of the FOIA Public Liaison and OGIS – that NARA had adopted the *entirely novel position*, unprecedented and in fact directly contrary to settled precedent, that *no agency at all* was either the "legal custodian" of these records or responsible for responding to FOIA requests for them, or that NARA could simply *ignore* requests for these records.

There was no way NARA could have expected me to anticipate or infer this decision.

I learned of these determinations by NARA for the first time, and to my complete surprise, during my phone call with Mr. Stern yesterday, although Mr. Stern told me that they had been made by NARA months ago. The reasons and purported legal basis (if any) for these determinations remain a complete mystery to me, even after yesterday's conversation.

I still have received no explanation for why this decision was not promptly disclosed to me, even when I asked. I can see no plausible good-faith explanation for this withholding.

NARA's obligation's with respect to this request are controlled by the decision of the Court of Appeals for the D.C. Circuit in *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, (1983):

“The CIA argues vigorously that the District Court's decision in the instant case was proper under the third branch of this test. Records that are in the possession of the agency to which a FOIA request is submitted but that were originally compiled by another agency, the CIA insists, are not ‘agency records’ within the meaning of the Act. So stated, the argument seems rather implausible, but this was indeed the theory on which the District Court rested its ruling....

“It has often been observed that the central purpose of the FOIA is to ‘open[ ] up the workings of government to public scrutiny’ One of the premises of that objective is the belief that ‘an informed electorate is vital to the proper operation of a democracy.’ A more specific goal implicit in the foregoing principles is to give citizens access to the information on the basis of which government agencies make their decisions, thereby equipping the populace to evaluate and criticize those decisions. Each of these objectives — and particularly the last — would be best promoted by a rule that *all records in an agency's possession, whether created by the agency itself or by other bodies covered by the Act, constitute ‘agency records.’*”

“This conclusion is buttressed by consideration of the probable practical effect of a different rule. If records obtained from other agencies could not be reached by a FOIA request, an agency seeking to shield documents from the public could transfer the documents for safekeeping to another government department. It could thereafter decline to afford requesters access to the materials on the ground that it lacked ‘custody’ of or ‘control’ over the records and had no duty to retrieve them. The agency holding the documents could likewise resist disclosure on the theory that, from its perspective, the documents were not ‘agency records.’ The net effect could be wholly to frustrate the purposes of the Act....

“A principle implicit in the foregoing definitions is that, when an agency receives a FOIA request for ‘agency records’ in its possession, it must take responsibility for processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere.” [Footnotes omitted; emphasis in original]

The position of NARA articulated to me by Mr. Stern during our conversation yesterday is *exactly* the position that the D.C. Circuit characterized as “rather implausible” when it was made by the CIA and the District Court, and that the D.C. Circuit *emphatically* rejected.

NARA's position, if applied to my current request, would have exactly the effect that the D.C. Circuit feared: "The agency holding the documents could likewise resist disclosure on the theory that, from its perspective, the documents were not 'agency records.' The net effect could be wholly to frustrate the purposes of the Act." In accordance with this precedent, NARA "cannot simply refuse to act on the ground that the documents originated elsewhere."

If (1) the records were created as agency records of an agency subject to FOIA, (2) the records are now in NARA's possession, and (3) NARA has not referred (and cannot refer) the request for those records to some other agency which will actually produce them without significant additional delay, NARA must respond to the request and produce the records itself.

Many of the cases in which *McGehee v. CIA* has been cited, and in particular in which the emphasized passage above has been quoted, concern records that were created by entities which were not "agencies" subject to FOIA. But the records I have requested were created by the NCMNPS, and it is undisputed that the NCMNPS was an agency subject to FOIA.

Other cases applying *McGehee v. CIA* have pertained to records not in the physical possession or actual control of the agency from which they were requested. But NARA has repeatedly told me, in writing, that the records I have requested are in the "custody" of NARA (although I learned yesterday that NARA thinks this somehow means something other than "legal custody"), and are being "retained" and "held" by NARA. NARA has claimed authority – and has in fact threatened – to delete, destroy, or dispose of these records. The power to dispose of records or artifacts is strongly indicative of possession and/or actual control.

During our phone call yesterday, Mr. Stern volunteered to me that records formerly held by the NCMNPS are now held in NARA's "warehouses" (in which I presume he included outsourced digital repositories in which files are held on NARA's behalf and under NARA's control). Other records responsive to this request were held by the NCMNPS on outsourced Sharepoint file servers, with respect to which the servers were owned by Microsoft but the files were owned and electronically controlled by the NCMNPS. Actual control of those files has passed from the NCMNPS to NARA. Similarly, records responsive to this request – such as the comments explicitly solicited and accepted by the NCMNPS from the public, in response to NCMNPS public inquiries, as messages through the Facebook account and other social media and online accounts created and controlled by the NCMNPS – are held on the servers of those Internet platforms, but were controlled by the NCMNPS and are now controlled by NARA.

An agency may hand off responsibility for responding to a request, *if and only* if that referral does not significantly impair or delay release of responsive records. As the opinion in *McGehee v. CIA* continues, in a passage which continues to be relied on in the D.C. Circuit and widely cited as persuasive authority in other Circuits with respect to FOIA referrals, "a system adopted by an agency for dealing with documents of a particular kind constitutes 'withholding'

of those documents if its net effect is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them."

In this case, in the absence of any referral, NARA's refusal to respond to portions of this request would *completely* impair and *infinitely* delay my obtaining requested records.

During our conversation yesterday, Mr. Stern asserted that NARA had been unable to identify any agency to which it could refer the portions of my request that NARA doesn't want to respond to itself. But rather than showing, as Mr. Stern claimed, that no agency is required to respond to requests for these records, NARA's inability to refer this request to any other agency is dispositive of NARA's own responsibility to respond to it.

I don't know why NARA doesn't want to respond to portions of this request. Perhaps it just doesn't want to add a portion of one more request to its backlog. But in accordance with the doctrine enunciated by the D.C. Circuit in *McGehee v. CIA* and adopted in every subsequent decision citing that portion of the opinion, if the request is for records created by an agency subject to FOIA and now in the possession of NARA, and if NARA can't refer the request to another agency, NARA must respond to the request and produce the responsive records itself.

Pursuant to the FOIA statute and well-established law in the D.C. Circuit, NARA must include all potentially responsive records in NARA's possession and/or control, including all records formerly held by the NCMNPS, in the scope of NARA's search for records responsive to this request, and must produce all responsive non-exempt records or non-exempt portions.

I request that, in response to this appeal, you direct that NARA (1) include all potentially responsive records in NARA's possession and/or control, including all records formerly held by the NCMNPS, in the scope of NARA's search for records responsive to this request, regardless of NARA's legal theories with respect to "legal custody" of these records; (2) produce all responsive non-exempt records or non-exempt portions of responsive records, and (3) preserve all potentially responsive records while this request and further proceedings related thereto, including administrative appeals or judicial review, are pending.

I also request that, in light of this appeal, you reconsider and reverse your denial of my appeal (NGC21-002A) of the denial of my request for expedited processing of this request.

Your denial of my appeal with respect to expedited processing of this request was based on the opinion that, "a significant portion of the information sought in your request is available on the NCMNPS website and we have already made processing your request a priority."

Almost all of the records included on the NCMNPS Web site (especially as that site existed in its final "sanitized" form at the expiration of the NCMNPS mandate, after many of the files formerly posted on that site, including entire sections of the site, had been removed in

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the final few weeks of the existence of the NCMNPS) were categorized as “permanent”. But only a tiny fraction of the records improperly excluded from my request as “not in NARA’s legal custody” although in NARA’s possession and/or control were ever on that Web site.

My appeal explained in detail numerous categories of requested records that were not available on the NCMNPS Web site and were not otherwise disclosed by the NCMNPS. But your assessment of my appeal appears to have ignored those arguments, presumably because (unbeknownst to me) NARA had improperly excluded those records from my request.

While the records disclosed by the NCMNPS were voluminous, that does not mean that they were complete or, perhaps more importantly, that the selection of which records were disclosed or categorized as permanent were unbiased. It’s easy, from any sufficiently voluminous and diverse data set, to produce a selective subset of records that, while still voluminous, are unrepresentative and misleading as a result of biased selections.

In fact, as this appeal makes clear, most of the records responsive to this request were not being processed at all, much less on a priority basis, but had improperly been excluded from the scope of records to be included in the search or disclosed if found. In light of this appeal, your findings that any significant portion of the requested records were or are available on the NCMNPS Web site, or that this should be dispositive of the significance of the other requested records – which I believe were never well-founded – should be reconsidered.

There is also additional evidence, since your initial decision to deny my appeal with respect to expedited processing, of the urgency and compelling need to inform the public about the subject matter of the requested records: The U.S. Supreme Court has been asked to review a decision in a case in which the NCMNPS was discussed, and records of its activities introduced, and to which records responsive to this request are likely to be significant.

A petition for *certiorari* in *National Coalition for Men v. Selective Service System*, Supreme Court Docket No. 20-928, quoting from and citing my Web site in the petition as the source for relevant records released by the NCMNPS in response to some of my FOIA requests, was filed with the U.S. Supreme Court on 8 January 2020. See my article, “Supreme Court asked to review Constitutionality of current male-only draft registration requirement”, 8 January 2021, <<https://hasbrouck.org/blog/archives/002587.html>>. Briefing with respect to *certiorari*, including preparation of briefs by *amici curiae*, is ongoing.

Records that the NCMNPS withheld from release but that are responsive to this request, including in particular records which NARA initially improperly excluded from this request, may undermine the credibility or weight to be given to the NCMNPS report and recommendations or specific claims in them. These records are likely to be germane to briefing and argument in the Supreme Court. Time is of the essence to obtain those records in time for

them to be submitted (by parties and/or *amici*) to, and considered by, the Supreme Court, with respect to *certiorari* and on the merits if *certiorari* is granted.

Accordingly, I request that you reconsider and reverse your denial of expedited processing.

Please respond as soon as possible to confirm your receipt of this appeal and to advise the reference number assigned to this appeal and the expected date of completion of NARA action with respect to this request, including action on this appeal.

I look forward to your consideration of this appeal and request for reconsideration. To avoid unnecessary delays, please contact me immediately by telephone or e-mail should you have any questions regarding this appeal and/or request.

I certify under penalty of perjury that the statements above are true and correct to the best of my knowledge and belief.

Sincerely,

---

Edward Hasbrouck

cc: Mr. Gary M. Stern  
General Counsel, FOIA Officer, and FOIA Public Liaison  
by e-mail to <[garym.stern@nara.gov](mailto:garym.stern@nara.gov)>

Office of Government Information Services (OGIS)  
by e-mail to <[ogis@nara.gov](mailto:ogis@nara.gov)>

# Attachment A

**24 Sep 2020, 13:45**

*Date sent:* Thu, 24 Sep 2020 13:45:47 -0700 (PDT)  
*From:* FOIA <FOIA@nara.gov>  
*To:* FOIA <FOIA@nara.gov>  
*Copies to:* "edward@hasbrouck.org" <edward@hasbrouck.org>  
*Subject:* FOIA Request NGC20-638 [FOIAonline NARA-NGC-2020-001111]

September 24, 2020

Dear Mr. Hasbrouck:

On September 21, 2020, the National Archives Office of General Counsel (NGC) received your FOIA request concerning records of the National Commission on Military, National, and Public Service (NCMNPS or Commission) that you submitted via email on the same date to [\\*foia@nara.gov\\*](mailto:foia@nara.gov) and to [\\*specialaccess.foia@nara.gov\\*](mailto:specialaccess.foia@nara.gov) (our Office of Research Services, Special Access and FOIA). This email serves to acknowledge receipt of your request to the extent it is seeking temporary NCMNPS records. Our office has assigned your request tracking number *\*NGC20-638\** in addition to a FOIAonline tracking number of NARA-NGC-2020-001111. Please cite both of these tracking numbers in any future correspondence to our office about this request.

The portions of your request seeking access to permanent records of the Commission that have been accessioned into the National Archives will be handled by the Special Access and FOIA office. That office will assign you a separate tracking number and respond directly to you.

Please note that any search for NCMNPS temporary records will be limited to those temporary records that were subject to a retention period beyond the termination of the Commission pursuant to the General Records Schedule (GRS) for which NARA took legal custody. This is not deemed to be a request for records contained within the NCMNPS temporary records that were appropriately scheduled for disposal upon the termination of the Commission on September 18, 2020 and that NARA is holding for a short interim period. As you were previously informed prior to the termination of the Commission, NARA will not accept FOIA requests for those records.

Sincerely,

The FOIA Team  
Office of General Counsel  
National Archives and Records Administration  
College Park, MD  
[foia@nara.gov](mailto:foia@nara.gov)

# Attachment B

**25 Sep 2020, 10:41**

*From:* Edward Hasbrouck <edward@hasbrouck.org>  
*To:* FOIA <FOIA@nara.gov>  
*Subject:* Re: FOIA Request NGC20-638 [FOIAonline NARA-NGC-2020-001111]  
*Copies to:* "edward@hasbrouck.org" <edward@hasbrouck.org>  
*Date sent:* Fri, 25 Sep 2020 10:41:12 -0700

On 24 Sep 2020 at 13:45, "FOIA" <FOIA <[FOIA@nara.gov](mailto:FOIA@nara.gov)>> wrote:

> Please note that any search for NCMNPS temporary records will be limited to  
> those temporary records that were subject to a retention period beyond the  
> termination of the Commission pursuant to the General Records Schedule  
> (GRS) for which NARA took legal custody. This is not deemed to be a  
> request for records contained within the NCMNPS temporary records that were  
> appropriately scheduled for disposal upon the termination of the Commission  
> on September 18, 2020 and that NARA is holding for a short interim period.  
> As you were previously informed prior to the termination of the Commission,  
> NARA will not accept FOIA requests for those records.

It is unclear to me whether this message is intended constitute (1) a request that I agree to narrow this FOIA request, (2) a description of the intended methodology and scope of your search for responsive records, (3) a notice of denial of a portion of my request, (4) a notice of a determination that some responsive records are exempt from disclosure, or (5) a notice of unilateral modification by you of my request.

Each of these raises different concerns. Please clarify the intent of the portion of your message quoted above, so that I can respond appropriately.

Peace,

Edward Hasbrouck

# Attachment C

**1 Oct 2020, 9:04**

*Date sent:* Thu, 1 Oct 2020 09:04:35 -0700 (PDT)  
*From:* FOIA <FOIA@nara.gov>  
*To:* FOIA <FOIA@nara.gov>  
*Copies to:* "edward@hasbrouck.org" <edward@hasbrouck.org>  
*Subject:* Response to your email of September 24, 2020 requesting clarification

October 1, 2020

Dear Mr. Hasbrouck:

The language you referenced from our acknowledgement of your FOIA request was included to provide you with advanced notice of, as you called it, the "description of the intended methodology and scope" of our search for records responsive to your request. Again, our search for temporary records responsive to your request will be limited to the temporary records that were subject to a retention period beyond the termination of the Commission pursuant to the General Records Schedule (GRS) for which NARA took legal custody. We hope this answers your inquiry.

Sincerely,

The FOIA Team  
Office of General Counsel  
National Archives and Records Administration  
College Park, MD  
[foia@nara.gov](mailto:foia@nara.gov)

# Attachment D

**1 Oct 2020, 10:13**

*From:* Edward Hasbrouck <edward@hasbrouck.org>  
*To:* FOIA <FOIA@nara.gov>  
*Subject:* Re: Response to your email of September 24, 2020 requesting clarification  
*Date sent:* Thu, 01 Oct 2020 10:13:00 -0700

To whom it may concern:

Thank you for the clarification in your message (copied below).

I remind you that your duty, pursuant to FOIA, is to conduct a search reasonably calculated to retrieve all responsive records.

Records that have been designated by NARA as temporary and/or that are not "subject to a retention period beyond the termination of the Commission [the National Commission on Military, National, and Public Service]" are highly likely to be responsive to this request.

A search reasonably calculated to retrieve all responsive records will necessarily include a search of those records.

You have not asserted any basis for limiting your search in the manner you propose, and no good-faith reading of the FOIA statute or NARA's FOIA regulations provides any plausible basis for such a limitation.

If records are in NARA's legal custody, they are subject to FOIA, regardless of how or when they they came into NARA's custody, regardless of whether they have been designated by NARA as permanent or temporary, and regardless of the intended retention period (if they were not potentially responsive to this and/or other FOIA requests) assigned to them by NARA pursuant to a NARA records schedule or otherwise.

The retention period planned by NARA would be relevant to the scope of the search required by FOIA *if and only if* the request were limited to records meeting certain criteria with respect to the intended retention period. This request contains no such limitation.

A search limited in the manner you propose (1) would not be reasonably calculated to retrieve all responsive records, (2) would not fulfill your obligations pursuant to FOIA, (3) would constitute prima facie evidence of bad faith in responding to this request, and (4) would constitute strong evidence of willful malfeasance in carrying out your FOIA duties.

I reiterate my request that you conduct a search reasonably calculated to retrieve all records responsive to this request, regardless of whether they have been designated by NARA as permanent or temporary and regardless of the intended retention period (if they were not potentially responsive to this and/or other FOIA requests) assigned to them by NARA pursuant to a NARA records schedule or otherwise.

As I noted in this request, I remain open to consultation regarding possible narrowing or consolidation of this request and my other pending requests, if you believe that this would be more efficient and expedite a response. You can reach me by phone in San Francisco at +1-415-824-0214.

Peace,

Edward Hasbrouck

On 1 Oct 2020 at 9:04, "FOIA" <FOIA <[FOIA@nara.gov](mailto:FOIA@nara.gov)>> wrote:

> October 1, 2020

>

> Dear Mr. Hasbrouck:

>

> The language you referenced from our acknowledgement of your FOIA request  
> was included to provide you with advanced notice of, as you called it, the  
> "description of the intended methodology and scope" of our search for  
> records responsive to your request. Again, our search for temporary  
> records responsive to your request will be limited to the temporary records  
> that were subject to a retention period beyond the termination of the  
> Commission pursuant to the General Records Schedule (GRS) for which NARA  
> took legal custody. We hope this answers your inquiry.

>

> Sincerely,

>

> The FOIA Team

> Office of General Counsel

> National Archives and Records Administration

> College Park, MD

> [foia@nara.gov](mailto:foia@nara.gov)

# Attachment E

**14 Dec 2020, 16:24**

*From:* GaryM Stern <garym.stern@nara.gov>  
*Date sent:* Mon, 14 Dec 2020 16:24:22 -0500  
*Subject:* Re: Request for assistance of FOIA Public Liaison and OGIS  
*To:* Edward Hasbrouck <edward@hasbrouck.org>  
*Copies to:* FOIA <FOIA@nara.gov>, OGIS <ogis@nara.gov>

Dear Mr. Hasbrouck:

You have already filed an administrative appeal to your request 2020-SP-33 , which the NCMNPS responded to and denied in its September 11, 2020 letter from Joseph Heck to you (copy attached). And in any event, NARA neither can nor will respond to an appeal of a FOIA request that was made to the Commission.

Moreover, as has already been explained to you, the "temporary records received by NARA from the NCMNPS that were \*not\* 'subject to a retention period beyond the termination of the Commission pursuant to the General Records Schedule (GRS)'" are not in NARA's legal custody, and NARA will not respond to any FOIA requests for those records. Rather, as noted in Mr. Heck's letter denying your administrative appeal, "Out of an abundance of caution, NARA intends to retain these temporary records until December 7, 2020—90 days from the date of your appeal of our denial of your FOIA request—for the purpose of allowing you to address any further legal rights related to this specific FOIA request."

Therefore, no further appeal of that request is necessary, and your "further legal right" to file a FOIA lawsuit commenced when the Commission denied your appeal. NARA agreed to keep the records for an additional 90 days, "out of an abundance of caution," in case you wanted to file such a lawsuit. While that time has now lapsed, NARA will hold this set of the Commission's records for an additional 60 days, or until February 15, 2021, to afford you that opportunity. We do not intend to respond to any further queries about this matter.

Sincerely,

Gary M. Stern  
General Counsel  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740  
301-837-3026 (office)  
301-837-0293 (fax)  
[garym.stern@nara.gov](mailto:garym.stern@nara.gov)

On Thu, Dec 3, 2020 at 9:26 PM Edward Hasbrouck <[edward@hasbrouck.org](mailto:edward@hasbrouck.org)> wrote:

> On 3 Dec 2020 at 17:37, "GaryM Stern" <GaryM Stern <[garym.stern@nara.gov](mailto:garym.stern@nara.gov)>>  
>  
> wrote:  
>

> > We have already explained to you how NARA is responding to your FOIA  
> > requests to NARA for the NCMNPS records that were transferred into our  
> > legal custody. As you know, we have acknowledged your request, have  
> > assigned it the appropriate FOIA case numbers, and have provided you with  
> > estimated dates of completion.

>

> I have been provided with case numbers for \*some portions\* of this  
> request, and with estimated dates of completion for those \*portions\*.

>

> I have \*not\* been provided with a reference number for the balance of the  
> request not included in the above portions, or an estimated date of  
> completion for that remaining portion, or a reference number or estimated  
> date of completion for the entirety of this request, including that  
> remaining portion.

>

> Specifically, I have been provided with some information concerning:

>

> (1) records designated as "permanent" by NARA; and

>

> (2) "temporary records that were subject to a retention period beyond the  
> termination of the Commission pursuant to the General Records Schedule  
> (GRS) for which NARA took legal custody".

>

> I have \*not\* yet been provided with the assigned reference number (if  
> any), assigned NARA component FOIA office (if any), status, or estimated  
> date of completion with respect to:

>

> (3) temporary records received by NARA from the NCMNPS that were \*not\*  
> "subject to a retention period beyond the termination of the Commission  
> pursuant to the General Records Schedule (GRS)" but for which NARA \*did\*  
> take legal custody.

>

> These records are now in NARA's custody, are subject to FOIA and to my  
> request to NARA, and are highly likely to be responsive to this request.

>

> What reference number has been assigned to this third portion of my  
> request? What is its status and the expected date of completion?

>

> If this portion of my request has been denied, please send me proper  
> notice of the denial, including the claimed basis for the denial and the  
> manner in which I may exercise my right to appeal the denial.

>

> So far as I know, this request remains pending with respect to all of the  
> requested records, including those in the third category as mentioned  
> above. No records potentially responsive to this request, including those  
> in this third category, may lawfully be deleted or disposed of while this  
> request or any appeals related to it remain pending.

>

> I was specifically told both by you on 14 September 2020 that:

>

> > NARA is currently in the process of taking interim custody, for a  
> > period of approximately 90 days, of the temporary records of the  
> > Commission that are appropriately scheduled for disposal upon the  
> > termination of the Commission on September 18, 2020. As Mr. Heck's  
> > letter states, NARA is doing so "for the purpose of allowing you to  
> > address any further legal rights related to this specific FOIA  
> > request," which include your right to seek judicial review.

>

> My legal rights also include, of course, the right of administrative  
> appeal. The FOIA statute provides a right to administrative appeal for

> good reason. It would be a significant derogation of FOIA rights --  
> particularly for the vast majority of FOIA requesters, including myself,  
> who typically cannot afford litigation -- to require requesters who  
> believe that their FOIA rights have been violated to proceed directly to  
> litigation, without the opportunity to pursue a less costly (for  
> themselves and the agency) administrative appeal. And exhaustion of  
> administrative remedies, including administrative appeal, is typically  
> \*required\* prior to FOIA litigation.

>  
> In the absence of any further clarification from you (despite my  
> diligently but unsuccessfully seeking any applicable guidance from NARA  
> and your assistance as FOIA Public Liaison), I reasonably assumed that  
> "for the purpose of allowing you to address any further legal rights"  
> included allowing me to pursue my right of administrative appeal.

>  
> Accordingly, I have today filed an administrative appeal with NARA of the  
> denial of my request 2020-SP-33. I thought this was what you wanted me to  
> do, and what I was required to do to preserve my rights.

>  
> This is also the logical inference from your notice that records would be  
> retained for 90 days, since the deadline for a FOIA appeal is 90 days  
> after the notice of denial, while the deadline for a FOIA lawsuit is  
> normally six years after the exhaustion of administrative remedies through  
> denial of an administrative appeal (unless the agency has waived the  
> requirement of exhaustion by failing to meet FOIA deadlines). Why else  
> would records be retained for 90 days, but no longer, other than to ensure  
> my ability to exercise my right of administrative appeal? If there was  
> some other rationale or explanation, it was not disclosed to me.

>  
> If your analysis was that my right of administrative appeal had somehow  
> been extinguished, and you intended to withhold these records in your  
> custody unless I sued, than you would logically have told me so, and would  
> have planned to retain them for 6 years, not 90 days. A lawsuit obviously  
> takes longer to prepare than an administrative appeal, and I had no reason  
> to begin seeking funding for litigation, or pro bono or contingent-fee  
> counsel, unless and until my administrative appeal was denied.

>  
> The responsive records and the administrative record pertaining to  
> processing of the original request by the NCMNPS records are now in NARA's  
> custody. If you believe that, despite this and despite not having  
> previously advised me of any other address to which this appeal should  
> have been submitted, some other office has responsibility, I trust that  
> you will so inform me and refer this appeal to that office.

>  
> My right to appeal the erroneous determinations and denials by the NCMNPS  
> (for which NARA bears, so far as I now know, no responsibility, although I  
> am still waiting for the records of NARA's communications with the NCMNPS)  
> would be less significant if I were able to make new requests for the  
> responsive records to NARA, now that they are in NARA's custody.

>  
> But so far as I can now tell, it appears that NARA's position may be that  
> even though these records are now in NARA's custody, NARA can (for  
> as-yet-unspecified reasons which, so far as I know, have no basis in  
> statute or regulations), summarily ignore requests for these records.

>  
> Have I misunderstood something? As FOIA Public Liaison, please advise how  
> NARA thinks this is supposed to work. Is it NARA's position that these  
> records are now in NARA's custody, but in some sort of FOIA-free zone?

>  
> The NCMNPS, while it was still in existence and still had these records,

> refused to "accept" a FOIA request for them (even though "acceptance" of a  
> FOIA request is not mentioned in the FOIA statute or regulations). Now  
> NARA has these records in its custody, but also refuses to "accept" a  
> request for them. As FOIA Public Liaison, please assist me by advising  
> what you think is the proper procedure I should follow to request these  
> records -- now in NARA's custody -- and from whom I should request them.  
>  
> The NCMNPS is not, of course, the first temporary Federal executive  
> agency, and won't be the last, whose records have been, or will be,  
> transferred to NARA when its mandate expires. Temporary agencies can be  
> expected to receive substantial and significant FOIA request at the end of  
> their term, when it is too late for them to be processed fully (including  
> appeals) before the agency is dissolved and its records transferred to  
> NARA. How has this been handled in the past? How do you think it should be  
> handled in the future, both by NARA and by requesters such as myself?  
>  
> I searched for information about this on NARA's Web site. Finding none, I  
> sought the assistance of the FOIA Public Liaison and sought guidance from  
> OGIS. In a message on 24 September 2020, OGIS advised:  
>  
> "NGC staff informed OGIS that you have subsequently submitted a FOIA to  
> NARA for the records at issue. NGC will be responding to you directly.  
> At this point, we recommend that you wait until NCG processes your request  
> and sends you an initial response. You will be accorded appeal rights in  
> the event that you are dissatisfied with NGC's response."  
>  
> Does OGIS have any other advice or recommendation, now that it appears  
> that (1) OGC is deliberately (mis)construing my request to NARA as \*not\*  
> including many of the records at issue which I previously requested from  
> the NCMNPS (which request the NCMNPS unlawfully refused to "accept" or act  
> on) and have now requested from NARA (which request NARA also apparently  
> refuses to act on, for unspecified reasons), and (2) OGC has provided no  
> notice of my right to appeal this de facto denial of part of my request?  
>  
> > We will process your FOIA requests in accordance with the statute and  
> > NARA's implementing regulations and guidance, and will communicate with  
> > you about the status of your FOIA requests as necessary and  
> > appropriate.  
>  
> You refer to NARA's guidance. What is that guidance? I have received no  
> answer to my inquiries to NARA, including to you as FOIA Public Liaison  
> and beginning \*before\* the expiration of the NCMNPS (in order to assist me  
> in framing my requests), for what, if any, policies, procedures, or  
> guidance NARA has for handling of FOIA requests and appeals made to a  
> temporary agency, before and after the transfer of potentially responsive  
> records to NARA, including requests made shortly before the dissolution of  
> a temporary agency, or appeals with respect to such requests.  
>  
> In my e-mail message to you of 13 September 2020, I said:  
>  
> > I would welcome your suggestions or proposals as to the least  
> > burdensome way to handle this issue while fully respecting my FOIA  
> rights.  
> >  
> > I would be happy to confer by phone. If you or any NARA or NCMNPS FOIA  
> > or records management staff have any questions, please do not hesitate  
> > to call me at any time at 415-824-0214 in San Francisco.  
>  
> I reiterate my request for the assistance of the FOIA Public Liaison and  
> OGIS in this matter. I would still like to obtain your advice and

> assistance on how to proceed, and I would like to confer with you about  
> possibly narrowing some of my requests. Please suggest a time that would  
> be convenient for you, and a telephone number at which I can reach you.  
>  
> I don't blame NARA for the actions of the NCMNPS, and I have been seeking,  
> and continue to seek, your preferred and the least burdensome way to  
> obtain access to these records now in your custody. I look forward to your  
> advice and assistance, and to the opportunity to confer with you.  
>  
> Peace,  
>  
> Edward Hasbrouck  
>  
> -----  
> Draft Registration and Draft Resistance:  
> <https://Resisters.info>  
>  
> "Resistance News" mailing list:  
> <https://resisters.info/newsletter.html>  
>  
> Edward Hasbrouck  
> [edward@hasbrouck.org](mailto:edward@hasbrouck.org)  
> <https://hasbrouck.org>  
> +1-415-824-0214  
>  
>  
>

# Attachment F

**14 Dec 2020, 14:23**

**From:** Edward Hasbrouck <edward@hasbrouck.org>  
**To:** GaryM Stern <garym.stern@nara.gov>  
**Subject:** Re: Request for assistance of FOIA Public Liaison and OGIS  
**Copies to:** FOIA <FOIA@nara.gov>, OGIS <ogis@nara.gov>  
**Date sent:** Mon, 14 Dec 2020 14:23:29 -0800

On 14 Dec 2020 at 16:24, "GaryM Stern" <GaryM Stern <[garym.stern@nara.gov](mailto:garym.stern@nara.gov)>> wrote:

> Moreover, as has already been explained to you, the "temporary records  
> received by NARA from the NCMNPS that were \*not\* 'subject to a retention  
> period beyond the termination of the Commission pursuant to the General  
> Records Schedule (GRS)'" are not in NARA's legal custody, and NARA will not  
> respond to any FOIA requests for those records.

You are mistaken. It has never been "explained" to me that these records "are not in NARA's legal custody". Rather, I have been told that these records have been "transferred to" and are being "held by" or "retained by" NARA. All this implies, so far as I know, NARA's legal custody of them, particularly in the absence of any identification to me of any another custodian of these records.

Moreover, I was specifically and explicitly informed by you in your e-mail message on 14 September 2020 that, "NARA is currently in the process of taking interim custody" of these records.

If you have since formed the opinion that, although they have been "transferred to" and are being "held by" NARA, and that NARA was "taking... custody of" these records, they are no longer "in the legal custody of" NARA, I request your assistance as FOIA Public Liaison -- which assistance is required by the FOIA statute to be made available to requesters -- to identify the agency other than NARA which you now believe to be the legal custodian of these records, so that I can request these records from that agency pursuant to NARA.

I also request that, in accordance with the FOIA statute, you refer any portion of my pending request to NARA, with respect to which which you believe that potentially responsive records may be held by another agency, to that agency, if you have not done so already.

If, in order to find out who if not NARA is now the legal custodian of these records, I need to file a separate new FOIA request with NARA for NARA's records regarding custodianship of these records and any onward transfer of custody of these records to another entity after "taking temporary custody" of them, please let me know and I will immediately prepare and submit such a request. But I don't think that should be necessary.

> Rather, as noted in Mr. Heck's letter denying your administrative  
> appeal, "Out of an abundance of caution, NARA intends to retain these  
> temporary records until December 7, 2020--90 days from the date of your  
> appeal of our denial of your FOIA request--for the purpose of allowing  
> you to address any further legal rights related to this specific FOIA  
> request."  
>  
> Therefore, no further appeal of that request is necessary, and your  
> "further legal right" to file a FOIA lawsuit commenced when the Commission

> denied your appeal. NARA agreed to keep the records for an additional 90  
> days, "out of an abundance of caution," in case you wanted to file such a  
> lawsuit. While that time has now lapsed, NARA will hold this set of the  
> Commission's records for an additional 60 days, or until February 15, 2021,  
> to afford you that opportunity.

Mr. Heck's letter, as you correctly quoted, did not refer to a lawsuit, but did indicate that the records would be "retained by" NARA.

The statute of limitations for a FOIA lawsuit is 6 years, not 90 days. So there was and is no reason for me to believe that Mr. Heck's letter was intended to refer to a lawsuit, much to refer solely to the right to sue.

My "legal rights with respect to" these records include my right, now that they have been transferred to and are being held by NARA, to request them from NARA pursuant to FOIA, as I have now done through the FOIA request to NARA with respect to which I am seeking your (statutorily mandated) assistance as FOIA Public Liaison (A) in properly directly my request and/or having it properly referred to the current lawful custodian of these records, and (B) in conferring with you regarding possible narrowing of this request if that might expedite a response.

> We do not intend to respond to any further queries about this matter.

I reiterate my request for the assistance of the FOIA Public Liaison, as discussed above, (A) to determine the proper agency (if not NARA) to which to direct a request or have this request referred, and (B) to confer regarding possible narrowing of this request to expedite a response.

I request the mediation service of OGIS to assist me in (C) obtaining the assistance of the FOIA Public Liaison with respect to this request and (D) identifying what agency -- if not NARA itself -- NARA now believes to be the legal custodian of these records transferred to and held by NARA.

I realize that this may place OGIS in an awkward position as a NARA component. But I was specifically informed that OGIS mediation services are available with respect to this request to NARA.

Peace,

Edward Hasbrouck